

IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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**PETITION FOR EXEMPTION OF
CERTAIN SERVICES**

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T.R.A. DOCKET ROOM

DOCKET NO. 03-00391

BRIEF OF CONSUMER ADVOCATE AND PROTECTION DIVISION

INTRODUCTION

Comes now Paul G. Summers, Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), and hereby submits its Brief in the above-captioned docket. The Consumer Advocate offers its arguments in order to set out its prime concerns regarding the exemption of intraLATA toll service from regulatory requirements.

ARGUMENT

I. A CARRIER'S PROVISIONING OF INTRALATA TOLL SERVICE AND INTERLATA TOLL SERVICE SHOULD BE REGULATED THROUGH ESSENTIALLY THE SAME REQUIREMENTS.

BellSouth Telecommunications, Inc. ("BellSouth") and Citizens Telecommunications of Tennessee, LLC ("Citizens") (collectively, "Petitioners") have requested the TRA to enter an order exempting intraLATA toll telecommunications services from certain regulatory requirements. BellSouth has stated that, "[a]s a substantive matter, BellSouth's position is that the Authority should exempt intraLATA toll service from regulatory requirements such that intraLATA toll service would be treated just as interLATA toll service is currently treated by the Authority." BellSouth

Telecommunications Inc.'s Proposal Regarding Procedural Schedule at 2. Petitioners' further state that "[w]hat the relief sought would do is provide ILECs the opportunity of increased pricing flexibility - enabling them to compete, in real time, with the many competitors, identified in this docket, who offer such services in Tennessee." Proposal Regarding Relief Sought at 3.

Based on its investigation and analysis of the discovery and administrative record in this docket, the Consumer Advocate concludes that many of the conditions and characteristics of the intraLATA toll service market and interLATA toll service market appear to be the same or substantially similar. Moreover, it is apparent that BellSouth and the Consumer Advocate view both the intraLATA toll and interLATA toll service markets as being comparable to one another. *See* Direct Testimony of Kathy Blake at 6. It therefore makes sense from the carrier's and consumer's perspective to regulate these services through essentially the same requirements.

Accordingly, the Consumer Advocate is in general agreement with BellSouth's position that a carrier's provisioning of intraLATA toll service should be regulated in essentially the same manner as its provisioning of interLATA toll service. The Consumer Advocate therefore does not oppose the TRA's entry of an order that would essentially loosen the regulatory requirements pertaining to intraLATA toll service to the extent that remaining intraLATA toll requirements would mirror current requirements for interLATA toll service.

Up until 2001, interLATA toll service was governed by the same or essentially equivalent statutory requirements as intraLATA toll service. During the 2001 legislative session, the General Assembly exempted an interexchange carrier's provisioning of service across LATA boundaries from rate regulation under Tenn. Code Ann. §§ 65-5-201 and 65-5-203. *See* Tenn. Code Ann. § 65-4-101(a)(9) (Supp. 2003); 2001 Tenn. Pub. Acts ch. 27 § 1. For purposes other than rate regulation,

however, interexchange carriers continue to be “public utilities” that must adhere to all other applicable regulatory requirements. *See Id*

Accordingly, the Consumer Advocate understands the Petitioners’ request for increased pricing flexibility for intraLATA toll service. *See Proposal Regarding Relief Sought at 3.* And, for the reasons stated above, the Consumer Advocate does not oppose this request. However, for the same reasons it makes sense to treat intraLATA toll and interLATA toll alike, it would make little sense to deregulate intraLATA toll beyond that which interLATA toll is regulated today.

Because the interLATA services of interexchange carriers were exempted only from rate regulation requirements, the Consumer Advocate believes that intraLATA services also should be exempted only from rate regulation requirements, thereby granting Petitioners the pricing flexibility that they seek in this docket. And because interexchange carriers are “public utilities” that must adhere to all applicable regulatory requirements except for Tenn. Code Ann. §§ 65-5-201 and 65-5-203, incumbent local exchange carriers also should adhere to all applicable regulatory requirements except for comparable rate regulation requirements.

Finally, the Consumer Advocate is of the opinion that the TRA should take a measured approach to Petitioners’ request, and that the agency should carefully consider the ramifications of exempting intraLATA toll service from regulatory requirements before any such exemption is granted. Because unforeseen consequences can occur despite one’s best effort to conduct a thorough analysis, and because telecommunications markets are dynamic and subject to change, the Consumer Advocate recommends that the TRA reserve the right to withdraw any exemption granted in this docket to the extent future events prove such withdrawal prudent.

II. THE SCOPE OF EXEMPTION IN THIS DOCKET IS LIMITED TO ALL OR A PORTION OF THE REQUIREMENTS SET FORTH IN THE SECTIONS OF PART 2 OF CHAPTER 3 OF TITLE 65 OF THE TENNESSEE CODE.

BellSouth and Citizens submitted a “Petition to exempt certain services from regulatory requirements contained in Tenn. Code Ann. Title 65, Chapter 5, Part II.” Petition for Exemption of Certain Services at 1. Petitioners made their request pursuant to Tenn. Code Ann. § 65-5-208(b). *See Id.* Petitioners also request the TRA to “issue an order exempting intraLATA toll services to the full extent permitted under the statute,” with four specific exceptions. Proposal Regarding Relief Sought at 2-3. This statute authorizes the TRA to provide regulatory relief from all or a portion of the requirements set forth in the Sections of Part 2 of Chapter 5 of Title 65 of the Tennessee Code:

The authority, after notice and opportunity for hearing, may find that the public interest and the policies set forth herein are served by exempting a service or group of services from all or a portion of the requirements of this part. Upon making such a finding, the authority may exempt telecommunications service providers from such requirements as appropriate. The authority shall in any event exempt a telecommunications service for which existing and potential competition is an effective regulator of the price of those services.

Tenn. Code Ann. § 65-5-208(b) (Supp. 2003) (emphasis added). “This part” refers to the Sections of Part 2 of Chapter 5 of Title 65.¹ Since all of the Sections of Part 1 of Chapter 5 have been repealed, the statute, in effect, authorizes the TRA to exempt services from all or a portion of the requirements of Chapter 5, which consists of Tenn. Code Ann. §§ 65-5-201 through 65-5-213.

Accordingly, it is beyond the scope of Petitioners’ request, as well as the TRA’s authority, to exempt intraLATA toll service from the regulatory requirements contained in Chapters 1, 2, and

¹ The Tennessee Code has a tiered numbering system, consisting of title, chapter, part and section. For example, Tenn. Code Ann. § 65-5-208(b) is read as Title 65, Chapter 5, Part 2, Section 08, Subsection (b). *See* Tennessee Code User’s Guide, Volume 11A, “Numbering System” at xii.

4 of Title 65. It would be inappropriate, therefore, for the TRA to enter an order exempting intraLATA toll service from the requirements set forth in these sections of the Tennessee Code or any of the associated TRA rules and regulations promulgated pursuant to such statutory authority.

III. CERTAIN INCUMBENT LEC REQUIREMENTS PROHIBITING ANTI-COMPETITIVE PRACTICES SHOULD BE MAINTAINED.

Petitioners apparently recognize that prohibitions against an incumbent LEC's anti-competitive pricing practices should be maintained. *See* Proposal Regarding Relief Sought at 2-3. In particular, Petitioners state that incumbent LECs should be prohibited from pricing intraLATA toll services below cost and that nothing would prevent parties from coming to the TRA to seek relief for such anti-competitive practices. *See Id* Moreover, BellSouth has indicated that the TRA should retain jurisdiction to hear such complaints. *See* BellSouth Telecommunications, Inc.'s Response to the Second Set of Discovery from the CAPD at 7.

Presently a complainant may bring an anti-competitive pricing claim against an incumbent LEC under Tenn. Code Ann. § 65-5-208(c) and associated TRA rules (*see, e.g.*, TRA Rule 1220-4-8-.09 (Aug. 1999)). The Consumer Advocate submits that it makes no sense to exempt intraLATA toll service from known anti-competitive pricing standards under the law in favor of a new, to-be-determined standard established by an agency order, which presumably would attempt to accomplish the same purpose as existing law.

In particular, the basis for a prospective party's relief from an anti-competitive pricing claim is better left to statutes and duly promulgated TRA rules as opposed to a specific agency order that was entered to provide requested relief to individual petitioners. These statutes and rules provide specific grounds for an action and can be construed according to guiding principles. *See, e.g.*,

BellSouth BSE, Inc. v. Tennessee Regulatory Auth , 2003 WL 354466 (Tenn. Ct. App. Feb. 18, 2003) (construing and interpreting Tenn. Code Ann. § 65-5-208(c)). The Consumer Advocate is uncertain what basis a prospective party would have to lodge a claim under the agency's order, what specific standards would apply to an incumbent LEC's pricing practices under the order, how the order may be interpreted to resolve potential disputes involving anti-competitive pricing claims; and how the agency's resolution of the dispute pursuant to its order may be reviewed by the courts. This simply is not the appropriate way to develop new regulations. *See Tennessee Cable T.V. Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151, 160-162 (Tenn. Ct. App. 1992).

Accordingly, the Consumer Advocate submits that the TRA should not exempt incumbent LECs from the anti-competitive pricing requirements that are well grounded in the law in favor of constructing its own, similar requirements through entry of an agency order in this proceeding. It is one thing to exempt a service from existing regulatory requirements, it is another to change from existing requirements to something new. That decision is better left for consideration in a more appropriate proceeding than this one.

IV. ANY RELIEF GRANTED TO PETITIONERS IN THIS DOCKET SHOULD BE CONSISTENT WITH FEDERAL LAW.

The TRA should not enter an exemption order in this docket that would have the effect of permitting an incumbent local exchange carrier to either circumvent or abridge its obligations under the federal Telecommunications Act of 1996. For instance, federal law imposes a duty upon incumbent local exchange carriers, such as Petitioners, to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to non-carrier customers; and it imposes a further duty to not prohibit or impose unreasonable or discriminatory conditions or limitations on

the resale of telecommunications services. *See* 47 U.S.C.A. § 251(c)(4) (2001); 47 C.F.R. §§ 51.605(e) & 51.613(b) (2003). The TRA therefore should not enter an order that exempts an incumbent LEC from regulatory requirements governing its resale of intraLATA toll telecommunications service under federal law.²

This concern arises within the context of this docket because Petitioners are seeking relief from current tariffing requirements pertaining to intraLATA toll service, which the TRA may grant. *Compare* Tenn. Code Ann. § 65-5-208(b) (Supp. 2003) *with* Tenn. Code Ann. § 65-5-202 (Supp. 2003). It is commonly understood, however, that telecommunications tariffs are an integral part of the federal resale scheme. *See, e.g.*, Local Competition Order, FCC 96-32, 1996 WL 452885, ¶¶ 872, 939 (Aug. 8, 1996) (¶ 872 concluding that a minimum list of services subject to resale requirements need not be prescribed because state commissions, incumbent LECs, and resellers can determine such services by examining the incumbent LEC's tariffs, and ¶ 939 concluding that resale conditions and restrictions are found in the incumbent LEC's underlying tariffs); Final Order in Docket No. 96-01331 at 7 (Tenn. Reg. Auth. Jan. 17, 1997) (ordering that the wholesale discount be established as a set percentage off the tariffed rates). Petitioners apparently recognize that their requested combination of tariffs and price lists for intraLATA toll service must not affect an incumbent LEC's federal resale obligations relating to such service. *See* Proposal Regarding Relief Sought at 2.

² Citizens' observation that it has no incumbent LEC duty to offer intraLATA toll service for resale at a wholesale discount under federal law is just plain wrong. *See* Answer of Citizens Telecommunications Company of Tennessee, LLC to Second Set of Discovery From Consumer Advocate and Protection Division of Office of Attorney General, Response to Interrogatory No. 6 at 4-5. In particular, intraLATA toll service is a "telecommunications service" under the definition of the federal Act. *See* 47 U.S.C.A. § 153(43) & (46) (2001). *See also* Local Competition Order, FCC 96-32, 1996 WL 452885, ¶ 871 (Aug. 8, 1996).

Accordingly, any new requirement for the tariffing and price listing of intraLATA toll service must operate as tariffs operate today with respect to an incumbent LEC's federal resale obligations.³ In particular, any new requirements must provide a transparent basis for a reseller to: (1) identify intraLATA toll services available for resale; (2) reference any reasonable and nondiscriminatory conditions or limitations on the resale of such services; and (3) calculate the wholesale price of such services. Unless the TRA sets comprehensive and concrete requirements for each of these areas, problems may arise in the future. For instance, a carrier may file a price list that includes a price band range. Without any clarification, this would present an unworkable situation for federal resale purposes because it does not identify a set retail price from which the wholesale discount would be deducted. In such cases, additional requirements would be needed to clarify the incumbent LEC's resale obligations. The Consumer Advocate maintains that for price lists containing price band ranges, an incumbent LEC should be required to resale the service at a wholesale discount off the lowest price in the price band range.

Thus, if the TRA changes the current tariffing requirements for intraLATA toll, it should protect the interests of resellers and their customers by requiring published filings that specifically identify or reference the description of the service offered, that identify or reference any associated conditions or limitations on resale of the service, and that provide a clear basis for the calculation of the wholesale rate.

³ For the reasons stated in section I, *supra*, the Consumer Advocate maintains that the toll-service tariffing and notice requirements for incumbent local exchange carriers should be essentially the same as such requirements for interexchange carriers.

V. THE TRA SHOULD STATE WHETHER INTRALATA TOLL SERVICE REVENUE WILL CONTINUE TO BE CLASSIFIED AS REGULATED REVENUE FOLLOWING THE COMPLETION OF THIS DOCKET AND, IF INTRALATA TOLL SERVICE REVENUE IS TO BE CLASSIFIED AS NONREGULATED REVENUE, THE TRA SHOULD CLARIFY HOW SUCH CLASSIFICATION WOULD IMPACT RATE-OF-RETURN REGULATED CARRIERS.

It is unclear to the Consumer Advocate whether intraLATA toll service revenue will be treated as regulated revenue or non-regulated revenue after this docket is completed. Petitioners state that if the requested exemption is granted, such exemption shall not affect price regulation. *See* Proposal Regarding Relief Sought at 3. It therefore appears that Petitioners are seeking pricing flexibility rather than the deregulation of intraLATA toll service revenue.

However, if in this docket the TRA determines that intraLATA toll service revenue should no longer be classified as regulated revenue, the agency should reconcile this decision with the accounting and reporting requirements for both price-regulated carriers and rate-of-return regulated carriers. Because only regulated revenue counts toward the revenue requirements of rate-of-return regulated carriers, the deregulation of a portion of regulated revenue would impact the calculation of revenue requirements in any future rate proceeding for these companies.⁴ The impact on revenue requirements would not only consist of the amount of reclassified revenue but also include allocations to the nonregulated activity for rate base investment, operating costs, taxes, and rate of return elements.⁵

⁴ The amount of revenue requirements over or under projected (attrition year) revenue determines the amount of rate increase or decrease in a rate-of-return rate hearing.

⁵ The accounting treatment of intraLATA toll settlements among rate-of-return regulated carriers differs. Some carriers classify such settlements as regulated access revenue while others classify these settlements as regulated toll revenue. It may become necessary to address this issue at some point, especially if toll revenue is deregulated while access revenue remains regulated.


If the TRA does not address or sufficiently resolve pertinent accounting and reporting issues in this docket, it should recognize that these issues may arise in future dockets, including rate hearings of rate-of-return regulated carriers.

CONCLUSION

The Consumer Advocate does not oppose the TRA's granting of the Petitioners' request for increased pricing flexibility for intraLATA toll service. For the reasons stated, however, the TRA should not grant any broader regulatory relief for intraLATA toll service than currently exists for interLATA toll service; it should limit the scope of any such relief to exemption from requirements set forth in the Sections of Part 2 of Chapter 5 of Title 65 of the Tennessee Code; it should require incumbent LECs to continue to adhere to requirements prohibiting anti-competitive pricing; it should not take any action that would frustrate any requirement of the federal Telecommunications Act of 1996, particularly requirements relating to resale of telecommunications services; and it should clarify the effect of any exemption granted in this docket on rate-of-return regulated carriers.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via facsimile or first-class U.S. Mail, postage prepaid, on July 23, 2004, upon:

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